ONTARIO HUMAN RIGHTS CODE
R.S.O. 1990, C.H. 19

BOARDS OF INQUIRY

B E T W E E N:

AWADH AHMED — Complainant

and

ONTARIO HUMAN RIGHTS COMMISSION — Commission

and

CANADA PACKERS INC. — Respondent

and

DAN CLOUTIER — Respondent

DECISION

BOARD OF INQUIRY	Professor Vern Krishna, Q.C.	
APPEARANCES:	Naomi Overend	Counsel for the Ontario Human Rights Commission
	Daniel J. McKeown	Counsel for the Respondents

I. APPOINTMENT OF BOARD

By letter dated March 2, 1993, I was appointed to form a Board of Inquiry pursuant to the *Human Rights Code* (the "Code") in the matter of Awadh Ahmed (the "Complainant"), complaint dated September 22, 1989.

The Complainant alleges discrimination in employment on the basis of race, ancestry, place of origin and harassment by Canada Packers Inc. (the "Corporate Respondent") and Mr. Dan Cloutier (the "Individual Respondent").

The Complainant, Mr. Ahmed, was employed as a Meat Cutter by the Corporate Respondent, Canada Packers Inc., from December 1988 to March 10, 1989, a period of approximately two and one-half months. As a result of certain incidents (described hereunder) which occurred on March 9, 1989, the Complainant's employment was terminated and the complaint which is the subject of this inquiry was filed with the Ontario Human Rights Commission ("OHRC") on September 22, 1989.

II. SUMMARY OF COMPLAINT

The Complainant alleged in his complaint (Exhibit 1, Tab 1) that he was performing his duties as a meat cutter on March 9, 1989 at the Corporate Respondent's premises when he greeted a fellow worker with an allegedly South African salute and said: "Nelson Mandela". The comment was apparently made in jest to one of the Complainant's co-workers.

A Federal Meat Inspector, Mr. Evan Stancombe, who was in the vicinity of the area where the Complainant was working witnessed the salute and accompanying comment and is alleged to

have said: "Fuck you and your Black power." This incident (which I shall refer to as the "first incident") was brought to the attention of the Corporate Respondent's foreman, Mr. Harry Myrie, and the incident was later recorded in a statement (Exhibit 1, Tab 7) signed by the Complainant and Mr. Myrie.

The Complainant also alleges that on the afternoon of March 9, 1989 Mr. Stancombe approached him with a piece of fat in his hand and made as if he was going to throw it at him. Mr. Stancombe threw the piece of fat in the garbage can, and looking at the Complainant, is alleged to have said: "Fuck you Blacks!". This incident (which I shall refer to as the "second incident") led to an exchange of heated language between the parties and was also reported to the Corporate Respondent.

Mr. Dan Cloutier, the Individual Respondent, and other supervisory employees of the Corporate Respondent, investigated the two incidents and prepared a report thereon. Following the investigation, the Corporate Respondent terminated the Complainant's employment on March 10, 1989 and he was escorted from his employer's premises.

The Complainant, originally from Kenya, complains that his right to equal treatment with respect to employment without discrimination because of race, colour, ancestry, and place of origin was infringed by the two Respondents, contrary to the provisions of the Code. The OHRC alleges that the Corporate Respondent condoned a racially poisoned environment and wrongfully terminated the Complainant's employment instead of dealing with the problem caused by the Federal Meat Inspector's remarks and actions. Thus, the OHRC alleges that race was implicitly a factor in the decision to terminate the Complainant's employment.

III. BACKGROUND OF COMPLAINANT

The Complainant was born in Kenya on November 20, 1954 and raised in Mombasa. He had very limited formal education in his childhood and started working in his father's butchering business when he was approximately five or six years of age. His father had a slaughterhouse and the Complainant helped him with various jobs in the butchering business.

Later on, the Complainant also worked in a tour business which his father had acquired.

Kenya was a colony of Britain until 1963. As such, there were British soldiers in Kenya until at least 1963, after which time they were phased out of the armed forces. Thus, the Complainant was exposed to British colonial forces at an early age. He witnessed various racial incidents during the course of his childhood and youth and some of these incidents involving the British colonial forces were not at all pleasant. As a result of his exposure to unpleasant racial incidents with the British colonial forces, he was cautious about his relationships with white persons, both in Kenya and later when he emigrated to Canada.

He met his wife, Sandra, a Canadian citizen, on her visit to Kenya. Following his marriage to Sandra, she applied for the Complainant's entry into Canada as a landed immigrant. The Complainant landed in Canada sometime around June 1987. His facility in the English language was limited at that time and remains so to this day.

The Complainant and his wife lived in Hamilton. He sought work as a general labourer and for some time worked on a mushroom farm. He attempted to improve himself by taking various part-time educational programs and generally attempted to make a new life in Canada. Ultimately, in response to an advertisement placed by the Corporate Respondent in a newspaper, the

Complainant sought, and was granted, employment with Canada Packers Inc. at their Burlington plant as a general labourer on their "kill floor".

IV. THE WORK ENVIRONMENT

The working environment on the kill floor of a meat plant can best be described as bloody. The Corporate Respondent employed a multi-racial labour force, most of whom appear to have operated as general labourers on the kill floor.

The Complainant gave extensive testimony as to the nature of operations on the kill floor and the location of each segment of the assembly line operation. Generally speaking, the operations on the kill floor involved killing cows, draining their blood, cutting off their feet, and cutting out the various parts of the cow in an assembly line operation. Similar operations were performed in the afternoon shift when they killed pigs. The blood and guts (and whatever else) from the carcasses would fall down onto the kill floor.

The evidence as to the number of people employed on the kill floor was somewhat uncertain. It appears, however, that there were at least 50-60 people employed at any particular time. Given the nature of the operations on the kill floor, various employees, including the Complainant, were required to handle sharp knives, which they used to cut off various body parts from the cow as it went around on the assembly line.

The Complainant worked with a knife which he testified he had to keep very sharp at all times. The knife had to be sharp enough to severe body parts in a methodical and timely manner as the hanging cow went around on the assembly line. The Complainant performed his tasks well

because he had been trained as a young boy to use the knife in his father's slaughterhouse in Kenya.

The Complainant's work performance was reviewed after his first month of employment as part of his general probationary review. His employers confirmed in the review (Exhibit 2, Tab M) that he had a satisfactory work record and a "very good" relationship with his foreman and fellow employees. The Complainant was reviewed again on February 20, 1989 after he had been at his employment for two months. Again, he received a satisfactory review on all counts and a recommendation was made that he should be retained as a permanent employee upon the completion of his probationary period of three months.

The Burlington Plant had a Collective Agreement (Exhibit 10) for the period September 4, 1987 to April 30, 1989. Article 3.7 of the Collective Agreement reads as follows:

> "The Company and the Union agree not to discriminate against any employee because of race, colour, creed or sex."

As a probationary employee, the Complainant was hired at a wage rate equal to 80% of the Group One rate of $12.05 per hour. This was the rate applicable to "General Labour", which was a broad category that applied to all persons who were not otherwise listed in the more specialized groupings. It was the starting point for new employees.

The Corporate Respondent also had an "employment equity policy" (Exhibit 12). Mr. Cloutier, the Manager of Human Resources, would give employees a copy of the policy and explain to them that it addressed women, visible minorities, native persons and the handicapped. Employees were also asked to fill in an employee census form. The Burlington Beef Plant recruited visible minorities as part of their hiring policy and took advantage of any "opportunity to

hire somebody into any position in the plant who would be in any of those four designated groups ..." (Volume 4, page 47). Employees had the option of self-identifying themselves if they wished to do so. The program of self-identification was entirely voluntary. The evidence as to the number of "visible minorities" as a percentage of the total plant population was somewhat vague. It appears, however, that approximately 60 employees self-identified themselves as being "visible minorities" out of a total plant population of approximately 184 employees. These numbers may have been slightly different as of the date of the two incidents that form the subject of this particular complaint. They are, however, reasonably approximate and indicate that the plant employed a multiracial community, at least at the general labourer level.

The Complainant testified (Volume 1, p. 84) that he had a good working relationship with his foreman and his fellow employees. There was no particular atmosphere of racial tension on the kill floor prior to the two incidents that formed the subject matter of this complaint. Similarly, the Complainant's relationship with the Federal Meal Inspector was one of distant respect between an employee and a person in a position of authority.

The Meat Inspectors were employees of the Federal Government (Agriculture Canada) and their presence at the Corporate Respondent's premises was required by law. The plant was a federally regulated plant and the meat inspectors were there to inspect the hygiene of the facility and animals. The Meat Inspectors were subject to the supervision of the Vet in charge.

The Complainant did not have regular or extensive dealings with Mr. Stancombe. The Complainant testified that he called Mr. Stancombe "Sir" but that Mr. Stancombe preferred to be called "General Max". He also testified that his understanding of "General Max" was that he was "... a bad guy in South Africa" who used to be the head of the police and, apparently, the cause of the death of Steve Biko (Volume 1, p. 96). According to the Complainant, this "General Max" character had a reputation in South Africa as a "dangerous guy". He responded to Mr.

Stancombe's request by laughing it off and smiling at him. The Corporate and Individual Respondent were not in any way aware of, or involved in, these conversations.

The Corporate Respondent shut down and closed its plant in Burlington in May 1990

V. THE FIRST INCIDENT

The Complainant's testimony in respect of the two incidents which are the subject of this hearing was at times quite vague and at other times remarkably lucid. I attribute part of his vagueness to difficulties he may have had with the English language and the tension associated with examination and cross-examination. On the other hand, however, even allowing for language problems, there were aspects of his personal life and events associated with the incidents about which he was remarkably vague.

The first incident occurred on the morning of March 9, 1989 while the Complainant was working at the tongue trimming station. He testified that one of his co-workers (a person named "Joe", though he was uncertain about this) passed by and he smiled at him. The co-worker stopped to talk with Mr. Stancombe, the Federal Meat Inspector, and they both looked at the Complainant and laughed. The Complainant laughed in return. When Joe passed by again on his way back, the Complainant made a South African type of salute and said "Amanda, Nelson Mendela" (Volume 1, p. 106). The Complainant also testified that when Mr. Stancombe saw him perform the salute he responded with the phrase "Fuck you and your Black race" or words to that effect. Although there was some confusion as to the exact words used, I am satisfied that Mr. Stancombe said approximately what the Complainant alleged he said, namely, "Fuck you with your Black race" or words with a similar meaning. This was clearly an obscene and racially offensive comment and, quite understandably, upset the Complainant.

The Complainant reported the incident to his General Foreman, Mr. Harry Myrie, who took down the details of the incident in his office. The foreman took down the details as reported to him by the Complainant. The Complainant signed the report of the incident (Exhibit 1, Tab 7). The report confirmed the nature of the racial slur, albeit in a slightly modified form: "Fuck you with you Black, ...".

The Complainant was justifiably upset with the incident. Unfortunately, the Complainant went on to issue threats and intimated that he might use his fists and knives to attack others. His statement of March 9, 1989 which he signed in the presence of his foreman states: "... I don't fight with the mouth I fight wit(sic) fist, ...".

After taking the statement, the foreman advised the Complainant to go back to his work and to report anything that might happen directly to the foreman. (Volume 1, p. 116). There was some uncertainty in the testimony as to the exact nature of the language used by the Complainant in his threatening comments. I have already referred to the Complainant's signed statement. In addition, The Human Rights Commission introduced a document (Exhibit 1, Tab 11), a signed statement by Dr. Beth Stephens of Agriculture Canada. The document (March 10, 1989) purports to be the report of the incident from the viewpoint of Mr. Stancombe, the Meat Inspector. The report identifies Mr. Stancombe's statement to the Complainant: "Fuck your Black power" and also describes the reaction it elicited. The report alleges that the Complainant said: "I will cut you up!".

The incident was also reported to Mr. Dan Cloutier, a Human Resources official with the Corporate Respondent. Mr. Cloutier prepared a list of events which occurred in considering the options available to the Corporate Respondent in dealing with the Complainant. This report (Exhibit 1, Tab 12) also identifies the Complainants threatening comments to the inspector: "I don't fight with the mouth, I fight with fist". This report goes further, however, and reports a further statement which the Complainant made: "I had to put the knives behind my back or I would have

used them". This latter statement was made to Mr. Cloutier and to Harry Myrie, both of whom testified to that effect. I accept their testimony on this aspect of the incident.

VI. THE SECOND INCIDENT

The second incident occurred on the afternoon of the same day at approximately 3 p.m. Details of the incident were reported to Mr. Dan Cloutier, the Individual Respondent, at approximately 3:15 p.m. on March 9, 1989. The record of the report was signed by both parties, Mr. Cloutier and the Complainant.

The Complainant was trimming tongues at the head wash station when he happened to turn around and see Mr. Stancombe come around from behind the eviscerating table. Mr. Stancombe bent down to pick up a piece of fat or meat which he threw into a can located behind the Complainant. Once again, there was an exchange of words between the Complainant and Mr. Stancombe, the Federal Meat Inspector. Apparently, the Complainant asked Mr. Stancombe: "What are you doing?", to which Mr. Stancombe replied "Fuck-off". Mr. Stancombe then went to the kill floor office (located to one side of the kill floor) and the Complainant followed him. Inside the office there was a small altercation. Mr. Stancombe apparently tried to use the telephone and had it to his ear when the Complainant depressed the switch hook and cut him off. Mr. Stancombe left the office, the Complainant followed him and was quite angry at this point. They met another supervisor (Steve Ghaney) who attempted to intercede in the dispute.

Mr. Cloutier said, and I accept his testimony, that the Complainant was very angry and "mad" when he made his statement. There were allegations of some shoving between the parties but there was considerable ambiguity about what occurred. I am satisfied on the basis of the testimony that there was a heated altercation between the Complainant and Mr. Stancombe and that there were threats made. Where the testimony of the Complainant and employees of the Corporate

Respondent conflict as to the nature of the behaviour, I prefer the testimony of the Respondents as supplemented by the signed statement.

VII. INVESTIGATIONS BY EMPLOYER

Both incidents were reported to the Corporate Respondent and investigated by various of its employees. Statements were taken and signed from the foreman in respect of both incidents (Exhibit 1, Tabs, 8, 9 and 10). In addition, there was a report filed by Dr. Beth Stephens (Exhibit 1, Tab 11) of Agriculture Canada. The entire incident was evaluated by the Individual Respondent in a written document (Exhibit 1, Tab 12) in which he considers the various pros and cons of the incidents.

It was the employer's practice to have the supervisor take notes of any investigation that resulted from an incident at the plant, to have the employee review the notes and then have him or her sign the record of the notes. Employees were not required to sign the record of notes, but could do so if they so chose.

I accept the testimony of Mr. Dan Cloutier that he was concerned with the aggressive nature of the Complainant's behaviour and comments. I am satisfied on the evidence that the Complainant was visibly upset as a result of the incidents and that he made statements that were of an aggressive and threatening nature to the Federal Meat Inspector. I am also satisfied that the Respondents were legitimately concerned that the Complainant, who was in the possession of sharp knives, was acting in a manner that was not conducive to a harmonious workplace environment.

The Corporate Respondent received Agriculture Canada's statement on the two incidents on March 10, 1989.

VIII. MEDICAL EVIDENCE

The OHRC put forward Dr. Granville de Costa as an expert medical witness. I accepted Dr. de Costa, a professor of psychiatry, affiliated with the University of Toronto as an expert witness on the psychological impact of racism, name calling and related areas. (Volume 3, page 89 and 96). Professor and Dr. de Costa was qualified as an expert witness in psychiatric medicine, with a special interest in race related issues.

Dr. de Costa testified at extensive length as to the psychological reaction to racial slurs and the feelings that the victim of such slurs might be expected to undergo. Based upon an interview of approximately 3 hours with the Complainant, Dr. de Costa filed a report (Exhibit 15) in which he explained in medical terms the stress and post-traumatic reaction that the Complainant felt as a result of his job loss. Dr. de Costa stated:

> "Mr. Ahmed's immediate psychological responses to the trauma of being fired was a mixture of emotions. They included anger, desire to undo the trauma, revengeful feelings, humiliation, despair, loneliness, blaming of others. Revengeful feelings for example, included thinking about the power and use of voodoo on the person who had offended him and by so doing destroy that person's life."

Dr. de Costa's testimony was substantially of an abstract nature given that his relationship with the Complainant was very brief and was not of a doctor-patient relationship.

IX. FINDINGS & ANALYSIS

The Corporate Respondent had a fairly stringent policy in respect of its probationary employees. Probationary employees who did not comply with the company's rules, regulations and expectations were liable to be discharged much more easily than full-time permanent

employees (Volume 4, page 42 and 76). This was the Respondent's general labour practice and was not in any way related to the race or identity of its personnel.

Disciplinary infractions included non-attendance at work without call in, showing up late for work, "horseplay", smoking in a restricted area, etc. The Corporate Respondent had previously dismissed probationary employees "... for something as insignificant as smoking in a restricted area, ...". In the case of permanent (non-probationary) employees, the Corporate Respondent was required to proceed according to the terms of the collective agreement.

It was important to the operations of the Corporate Respondent's that the assembly line continue uninterrupted. If the assembly line was halted for any reason, the employees simply stood around and waited and could not work. The assembly line processed approximately 800 cattle per day and each minute that the line was shut down represented a loss of money to the business. The financial impact of assembly line shutdowns was an important consideration to the employer.

The Complainant's threats to fight caused the Individual Respondent considerable concern (Volume 4, page 89) as did the inappropriate comments by the Meat Inspector. The Corporate Respondent did not, however, have any direct jurisdiction over the Federal Meat Inspectors. Their only recourse was to report any incidents or concerns to the senior person (the Veterinarian) in charge of the inspectors.

Mr. Cloutier asked Agriculture Canada for a statement on the incidents. When the statement was not forthcoming he had to chase Agriculture Canada down and insist that they prepare some sort of a statement so that the Corporate Respondent could conclude its investigation.

The Complainant was told by his supervisor that if he had any problems with the Meat Inspector that he should advise Harry Myrie or Steve Ghaney (supervisors). The Complainant did

not follow his instructions and followed Mr. Stancombe into the supervisor's office. In that office, he prevented Mr. Stancombe from using the telephone. The Complainant's conduct was aggressive.

Mr. Cloutier testified (and I fully accept his testimony on this point) that the Complainant told him and Mr. Harry Myrie that "It's a good thing that the knives were behind my back or I would have used them" (Volume 4, pg. 110). These repeated threats concerning fighting and the use of knives caused Mr. Cloutier considerable concern. The Complainant was upset, his speech was slurred and he made threatening comments.

Mr. Harry Myrie also testified that the Complainant was very angry and still wanted to fight with Mr.Stancombe (Volume 6, pg. 63). He also testified that the Complainant told him that he "... Followed Evan [Mr.Stancombe] everywhere because he was mad enough to hit him" (Volume 6, pg. 66).

Based upon the testimony of the witnesses, I am satisfied as to the following facts:

- The Complainant did make a South African type "black power" salute accompanied by some words in support of Nelson Mandela.
- The Federal Meat Inspector, Mr. Evan Stancombe, made an offensive and inappropriate response to the Complainant's salute. The Meat Inspector's words were inappropriate, offensive and constituted a racial slur against the Complainant.
- The Complainant was offended by the Meat Inspector's offensive racial slur and became visibly angry as a result of the comments made to him.
- The Complainant made threatening comments in which he intimated to his foreman that he would fight with his fists and might use his knives against the Meat Inspector.

- The Complainant did not follow his General Foreman's instructions to report any further incidents directly to the latter. Instead, he got into a further altercation with the Federal Meat Inspector and, as a result thereof, he made further threats.
- The Complainant created an atmosphere in which the Respondent became apprehensive as to his threats and the violence that might have resulted therefrom on the "kill floor" of the plant.
- Mr. Dan Cloutier investigated the two incidents to the best of his ability and took or received statements from the parties concerned including the Complainant and Agriculture Canada.
- The Corporate Respondent terminated the Complainant's employment as a direct consequence of the latter's aggressive behaviour and threats, including his reluctance to follow instructions, leaving his place of work on the assembly line without permission, and his statements that he might resolve the matter with recourse to his fists and knives.
- The Corporate Respondent followed its normal labour practice of not disciplining probationary employees but dismissing them for infractions of its corporate policy.
- The Corporate Respondent and Mr. Dan Cloutier did not in any way adopt or approve of the Federal Meat Inspector's inappropriate and offensive racial comments.
- The Federal Meat Inspector was an employee of the Federal Government and was on the plant premises exercising his rights under the law.
- The Corporate Respondent and Mr. Dan Cloutier had no direct supervisory authority over the Meat Inspector, who was under the supervision of Agriculture Canada.

The incidents were reported to the appropriate authorities in Agriculture Canada and a report was obtained from them. Not having adopted the Meat Inspector's comments or in any other

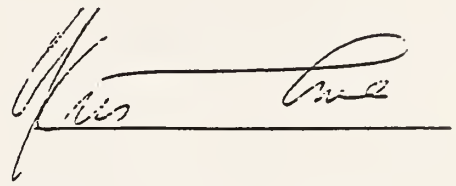
way condoned his actions, the Corporate Respondent and Mr. Dan Cloutier cannot be held responsible for the Inspector's comments.

The Corporate Respondent had a moral responsibility and the legal obligation to maintain a safe working environment, to take seriously any threats of violence that might occur on their premises and to respond appropriately to such threats. It would be unreasonable to expect the Corporate Respondent to stand by idly and not to react to threats of physical violence when other employees might be endangered. The Corporate Respondent did what it could do in the circumstances: investigate the incident, take written reports, and notify Agriculture Canada as to the involvement of one of its employees. Faced with the threat of physical violence from a probationary employee, they took the precaution of removing the employee from the premises and terminating his employment. In doing so, the Corporate Respondent and Mr. Dan Cloutier were not motivated by the Complainant's race, colour, ancestry or ethnic origin but were responding directly and consequential to the Complainant's threats of violence in the workplace environment and his insubordination in not following reasonable instructions.

To the extent that there were racist comments in the relationship between the Federal Meat Inspector and the Complainant, I am satisfied on the evidence that the Respondent's did not in any way contribute to or adopt the inappropriate comments made by the employee of Agriculture Canada.

X. DECISION

The Complainant's complaint dated September 22, 1989 alleging discrimination in employment on the basis of race, colour, ancestry and ethnic origin by Canada Packers Inc. and Mr. Dan Cloutier is dismissed.

Signed: 

Date: March 7, 1994.

Declaration of Management Policy (the "Code Card") in the lobby and rental office of any buildings owned or managed by Mr. Zarubin in Ontario.

These are reasonable requests in the circumstances, and they will be ordered.

O R D E R

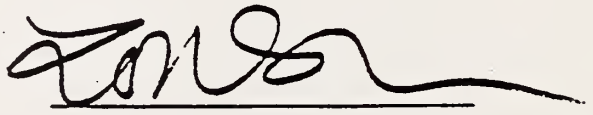
This Board of Inquiry, having found the respondent Branislaw Zarubin to have breached the Human Rights Code hereby orders the following:

1. That the Respondent pay to the Complainant Donna Kostanowicz the sum of $2,000.00 in damages.

2. That the Respondent prepare a written policy to be given to all persons who show apartments or who take or process rental applications at any residential building the Respondents owns or manages in Ontario. Such policy shall state that prospective tenants receive equal treatment without discrimination because of any ground enumerated in the Human Rights Code, and shall specifically mention equal treatment of persons in receipt of public assistance.

3. That the Respondent post in the lobby and rental office of any residential building he owns or manages in Ontario the Ontario Human Rights Commission's "Declaration of Management Policy."

Dated at Toronto, Ont.
March 7 , 1994.



Lorne Slotnick,
Board of Inquiry

not be more precise, saying he does not keep statistics on this basis. He said he is sometimes forced to evict tenants for non-payment of rent and recalled one eviction in 1988 or 1989 of a woman on mothers' allowance.

Credibility

In attempting to impugn Ms Kostanowicz's credibility, counsel for Mr. Zarubin made much of her statement in the hearing that when she eventually did move she lost her full day-care subsidy. Because the apartment she found was in Mississauga -- where, unlike in Metro Toronto, she was not eligible for a full subsidy -- she had to pay from her own money to keep her son in day care.

It then emerged that Ms Kostanowicz was, in addition to a partial day care subsidy in Mississauga, receiving money from the Regional Municipality of Peel under its Employment Strategies programme designed to assist welfare recipients who are in school. Under this programme, Ms Kostanowicz's day care subsidy was topped up to 100% of her actual cost for the days she spent in school. In other words, at least for the days she was in school, child care costs were no higher in Mississauga than they had been in Toronto. Given the elaborate procedures under the Employment Strategies programme linking the money directly to day-care costs, I was asked

to conclude that Ms Kostanowicz knew she was receiving a full subsidy and was wilfully deceiving the hearing by trying to exaggerate her damages.

Faced with this information, Ms Kostanowicz testified again, saying she made no direct payments to the day-care centre in Toronto, but that she did make payments in Mississauga. This is consistent with the Employment Strategies programme, which paid its portion of the day-care subsidy to the client rather than to the day-care centre. She said she was unaware that this money was for day-care, but rather thought it subsidized school costs such as transportation and school supplies. She cited the large number of forms she had to fill out and said she was often confused about which forms were for what.

Despite the clear link between the Employment Strategies money and day-care costs, I have concluded that Ms Kostanowicz is being honest and straightforward -- if not necessarily correct -- in saying she believed she was paying more in Mississauga than in Toronto. It is plausible that she was confused about what money was coming from where and for what. Having seen all the forms, I believe many people would be confused, particularly people who, like Ms Kostanowicz, have several bureaucracies in their lives at one time (family benefits, regular day-care subsidy, Employment Strategies, the school system and possibly others.)

In fact, it is conceivable that Ms Kostanowicz is correct that she had to pay extra money from her own pocket for day care in Mississauga. It is clear that the Employment Strategies top-up applied only to days she actually attended school. If there were days that she was off school -- with an illness, or because of school vacations, for example -- and still brought her son into the day-care centre, she would have paid for those days. There was no evidence on whether this was the case, but it is entirely possible.

For these reasons, I find that the evidence on day-care subsidies in Mississauga does not necessarily tarnish Ms Kostanowicz's credibility.

There are other reasons to believe her version of the story. In general, I found her story consistent and her manner credible. More important, I felt her version of events fit the preponderance of probabilities in the circumstances. For example, she says she was not shown an apartment, whereas Mr. Plamenco says she was. Her testimony on this issue does not help her case, and in fact hurts her case for damages because she was unable to say definitely that she would have taken the apartment had it been offered to her.

Another example: Ms Kostanowicz says she had a conversation with Mr. Zarubin in April, 1991, in which he told her that she did not get an apartment because she was on mothers' allowance. Mr. Zarubin says he never had any conversation with Ms Kostanowicz. But

if she had never talked to him, it is difficult to understand why she would have named him, and only him, a week or two later as the respondent in her complaint filed to the Human Rights Commission.

I also have difficulty with the evidence of Mr. Plamenco that Ms Kostanowicz said she did not know when she needed the apartment, and with the implication I was asked to draw that because her lease did not expire until September, and because that is when she actually did move, that she knew all the time that she probably could not get out of the lease until September. If this is the case, it seems unlikely that she would be looking so intensively for an apartment in April (she testified she had already seen about a dozen apartments before the Zarubin application). It also strains logic that she would tell Mr. Plamenco she did not know when she could start the tenancy, and then file a human rights complaint very shortly afterwards. It is difficult to see how she would have ended up in a human rights complaint had she been told, as Mr. Plamenco says, that she simply had to come up with a start date in order for the application to be processed. More consistent with the facts that are known is that she told Mr. Plamenco she wanted the apartment right away.

I have given some weight to Mr. Armstrong's evidence. He was the only witness with some degree of independence from the parties, although I am conscious that he became an advocate for Ms Kostanowicz. He testified that he was merely trying to check out

the facts when he called Mr. Zarubin and was told that receipt of welfare was the reason she did not get the apartment. Dean Zarubin says the conversation between his father and Mr. Armstrong took place in the summer of 1992 -- when Mr. Armstrong was clearly Ms Kostanowicz's legal representative, and was clearly partisan -- but I believe it is more likely he placed a call to Mr. Zarubin in 1991 than in 1992, more than a year after the complaint was filed. Overall, Mr. Armstrong has fewer reasons to distort the story than other witnesses.

In contrast, I find some major flaws with the evidence of Mr. Zarubin and his witnesses. Some of these problems are mentioned above. In addition, Mr. Zarubin testified that he doesn't look at how much money people make in assessing applications. Aside from the fact that this seems improbable to start with, it does not accord with the evidence in the large number of rental applications that were filed as an exhibit at the hearing. Many of these have the applicants' income circled, and some others have, in Mr. Plamenco's writing, an annual income figure calculated from an hourly wage rate that the applicant has given. This suggests that income is a significant factor in the assessment of prospective tenants. This is hardly a surprising conclusion, but it does tend to undermine Mr. Zarubin's protests to the contrary.

Large numbers of applications filed as exhibits -- both successful applications and ones that were not -- have portions

filled in in Mr. Plamenco's writing, suggesting that the incompleteness of Ms Kostanowicz's application may not have been the real problem.

Mr. Zarubin has stated that he has had and continues to have numerous recipients of public assistance among his tenants. From the documentation filed, there appears to be some truth to this. Some of these tenants moved in after it was clear that Ms Kostanowicz's human rights complaint was proceeding. Others were receiving assistance under settlement programmes for new immigrants -- arguably a qualitatively different type of public-assistance recipient than a single mother on welfare. I did not see conclusive evidence of someone in Ms Kostanowicz's situation being given an apartment in 1990 or 1991. After examining all the documents, I am unable to draw any inference from them that Mr. Zarubin's apartments were open in 1991 to recipients of public assistance.

I also found Mr. Zarubin somewhat evasive when it came to answering questions about who actually did get the apartments that were vacant at the time Ms Kostanowicz made her application. Even though he was forewarned that these questions would be asked, Mr. Zarubin said he did not have time to check.

It is not clear why Ms Kostanowicz was given an opportunity to fill out an application before she had seen an apartment. Mr. Plamenco said applications are filled out only after a prospective

tenant has seen an apartment and indicated an interest in it, and logic seems to favour this system. However, it is possible that some people were asked to fill out applications first so they would have to disclose their income and could be weeded out right away. Having looked at several hundred applications from the "pending file", I cannot really conclude whether any were filled out before the applicant saw an apartment, although it appears possible since many applications have no apartment number filled in.

For the above reasons, I have decided to believe Ms Kostanowicz's version of the events.

Conclusion

After considering the evidence I conclude that Ms Kostanowicz's application was not processed because Mr. Plamenco, acting on what he knew were Mr. Zarubin's feelings about recipients of public assistance, screened out the application.

I find that Mr. Zarubin was the author of the decision to deny access to the apartment to Ms Kostanowicz, and that the reason the decision was made is the reason he gave to both Ms Kostanowicz and Mr. Armstrong: that she was on welfare.

I agree with counsel for the Commission that the "right to equal treatment with respect to the occupancy of accommodation, without discrimination because of ... the receipt of public assistance" contained in Section 2 of the Code does not begin only when a tenancy agreement has been entered into. A violation of the Code has occurred when a prospective tenant has been treated unequally because of one of the prohibited grounds even at an early stage in the application process, before a prospective tenant has even decided whether he or she is interested in the accommodation. To find otherwise would fly in the face of the Code's goals.

I therefore find that Mr. Zarubin violated the Human Rights Code in his treatment of Ms Kostanowicz's rental application.

Damages and other Remedies

Ms Kostanowicz's representative asked me to award damages for the day-care costs incurred as a result of the move to Mississauga. As mentioned above, there is no firm evidence that costs actually increased, since I did not hear of any specific day that Ms Kostanowicz was off school and still took her son into day care. I make no award in this area.

I was also asked to compensate Ms Kostanowicz to the extent

of the day care subsidies she received in Mississauga and order the return of those subsidies to the proper agency, under the law relating to collateral benefits. There are several reasons I will not make such an order: these benefits were not received under an insurance scheme; Ms Kostanowicz received no more in subsidies in Mississauga than she had been receiving in Toronto; and the link between the violation of the Code and her move to Mississauga is too weak to make the connection.

I was also asked to award about $200 to Ms Kostanowicz to reimburse her for paint and other supplies to fix up her new apartment. Given that she testified that she did not even see Mr. Zarubin's apartment and thus no one knows whether she would have taken it, this area of damages is too remote to link to Mr. Zarubin's violation, particularly when she did not actually move until four months later. I make no award in this area.

In addition, I was asked to compensate Ms Kostanowicz for loss of income to attend the hearing. This was raised only in argument long after Ms Kostanowicz had an opportunity to testify as to whether she was losing any income as a result of attending the hearing. I make no award here.

With respect to general damages, the focus of much of the argument was the case of Willis v David Anthony Properties (1987) 8 C.H.H.R. D/3847, which, until very recently was the first and

only Ontario case to be decided on discrimination in accommodation based on receipt of public assistance. The Board of Inquiry in that case, in assessing general damages at $1,000, made the following statement:

> ...the fact of being in receipt of public assistance does not go to the core of a person's being in the same way as race, creed, sex, age or most of the other attributes which are prohibited grounds. Caution is called for in assessing a claim that discrimination on the basis of receipt of public assistance has caused deep or continuing mental anguish. (parag. 30461)

This statement has obviously caused some concern among advocates for welfare recipients. I heard expert evidence from Bruce Porter, who as Co-ordinator for the Centre for Equality Rights in Accommodation, is an advocate but also very knowledgeable on housing issues related to the poor.

Some of Mr. Porter's testimony was clearly more in the nature of argument by an advocate than provable findings by an expert. Nevertheless, he said there are often severe and long-term emotional consequences attached to being refused accommodation because one is on welfare. He said many victims of such discrimination feel the problem is their fault, that they are inadequate as human beings. This is a major blow to people who often have very little pride to begin with, he said. Many prospective tenants are told repeatedly and explicitly by landlords that they will not rent to people on welfare, he said, and this is as damaging as any form of discrimination.

Mr. Porter said he is concerned that the level of damages and settlements in these type of cases is a disincentive to people pursuing their rights. "If the broad consensus is that this isn't as serious a ground (of discrimination) as others, then it won't be pursued," he said. This creates an environment where landlords know they face little risk in violating the Code.

The problem with this evidence -- which Mr. Porter freely acknowledged -- is that general statements say nothing about the circumstances of a particular situation and how the individual concerned actually reacted to it.

However, to the extent that the Willis case suggests that this form of discrimination will normally draw a smaller award of general damages than other violations of the Code, I disagree with its approach. The Code makes no distinction between the various grounds of discrimination and the remedy for each. The nature of the anguish suffered may be different in a case of discrimination in accommodation based on receipt of public assistance, but the Code considers the violation just as serious as others.

In this particular case, Ms Kostanowicz testified that she was upset by Mr. Zarubin's statement that he would not rent to someone on mothers' allowance. She told the hearing that she "felt stripped of everything I had", felt she had received a "slap in the face",

felt "degraded," "totally shocked" and "still upset about it."

Aside from these general comments, the only specifics were that inconvenience was caused because Ms Kostanowicz ended up moving to Mississauga, because her son had a hard time adjusting and because the new apartment had to be cleaned up. There was evidence that vacancy rates were higher at the time in Mississauga than in Etobicoke. But in circumstances where Ms Kostanowicz testified that she did not even see the apartment in Mr. Zarubin's building, I believe damages arising from the move to Mississauga are too remote.

I accept that Ms Kostanowicz was upset by the discrimination. However, in a situation where it was not even clear that she wanted the apartment, the damage award of $8,000 requested by Ms Kostanowicz's representative is excessive. I believe a sum of $2,000 is more appropriate under Section 41 (1) (b) of the Code.

The Commission has asked that part of the remedy under Section 41 (1) (a) of the Code be that Mr. Zarubin be directed to prepare a written policy to be given to any person who shows apartments or who processes applications at any of his buildings in Ontario, and that this policy state that prospective tenants receive equal treatment without discrimination on any ground protected in the Human Rights Code with specific reference to the receipt of public assistance. The Commission has also asked for the posting of its